(1)

Supreme Court, U.S.
FILED

No. 981624 FEB 8 - 1999

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1998

WALTER KIRK & JOSEPHINE KIRK
Petitioners

Vs.

BERLIN PROBATE COURT
HONORABLE WALTER A. CLEBOWICZ,
LEOPOLD KEMMLING, EXECUTOR of the ESTATE
of
EUGENIA KEMMLING
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT, NEW YORK

PETITION FOR WRIT OF CERTIORARI

WALTER KIRK, Pro-Se
JOSEPHINE KIRK, Pro-Se

39 OLD POINT ROAD
MILFORD, CONNECTICUT
06460
TEL. (203) 874-8718

Rmg graphics milford, ct. 06460

26pp

QUESTIONS PRESENTED

For approximately four (4) years the Petitioners, Walter and Josephine Kirk, have diligently and also exhaustively sought help from both the State and Federal Judicial System as to their questions about the Constitutional rights of the then, totally disabled Mr. Walter Kirk. The Petitioners were also the Plaintiffs in all of the legal proceedings that were initially brought before the Probate Court in New Britain, Connecticut when their claim against the Estate of Eugenia Kemmling was dismissed for not being filed in a timely manner as required by statute.

In the resulting appeal from Probate, each and every ruling handed down by the succeeding Courts, the judges indicated that the Court lacked the jurisdiction and statutory authority required to make a judgment on their particular claim and the matter was dismissed. In the final Federal appeal, with the oral argument, to the United States Court of Appeals, for the Second Circuit, in New York, the judges also indicated that even this Court lacked the authority and jurisdiction and that only the Supreme Court of the United States would have the authority to rule and make judgment on the matter.

It is this question of the Plaintiff being denied due process of the law and equal protection under the law, that while he was stricken and declared then, totally disabled during the legal proceedings of an on going, and still open Probate Court case, is seeking this petition for a Writ of Certiorari unto the Supreme Court of the United States of America.

PARTIES TO THE PROCEEDING

The parties to the proceeding were:

WALTER KIRK, PRO-SE PETITIONER & PLAINTIFF
JOSEPHINE KIRK, PRO-SE PETITIONER & PLAINTIFF

BERLIN PROBATE COURT, HON. WALTER A. CLEBOWICZ, DEFENDANT
REPRESENTED BY ATTORNEY HELEN R. KONE, P.C., OF THE LAW OFFICE OF HELEN R. KONE, P.C.

LEOPOLD KEMMLING, EXECUTOR OF THE ESTATE OF THE DECEDENT, EUGENIA KEMMLING, DEFENDANT RESPRESENTED BY ATTORNEY ALFRED MORROCCO, JR. ESQ. OF THE LAW OFFICE OF MORROCCO, HAMZY, AND CONLIN, L.L.C.

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STATEMENT OF RELATED CASES

1. The Petitioners and Plaintiffs are not aware of any related cases heard by this Supreme Court of the United States of America or any previously heard by the United States Federal Courts or State Courts under the same or similar title.

2. The Petitioners also are not aware of any pending cases before this Court or any lower Federal or State Court that will directly affect or be directly affected by this Courts decision.

3. The Petitioners after extensive research in the law libraries have not found any previously related cases that have the same unusual and special circumstances and justification of an exception to the rules as their case of Kirk et al. Versus The Probate Court, et al.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Walter Kirk and Josephine Kirk respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals, Second Circuit, affirming the district court's granting a "Motion to Dismiss" entered in the above proceeding on November 9th, 1998. May your decision echo the same "Approval of a Review", for the petitioners, as was granted 2,000 years ago to the Apostle St. Paul "Thou hast appealed unto Ceasar, unto Caesar shalt thou go". (Act. 25:12 K.J.V.)

OPINIONS BELOW

The United States Court of Appeals, Second Circuit, issued an order affirming the district court's granting a "Motion to Dismiss" and is reprinted herein as Appendix A. The judgment of the District Court, District of Connecticut, is reprinted herein as Appendix B.

JURISDICTION

The Order by the United States Court of Appeals, Second Circuit, affirming the district court's granting of a "Motion to Dismiss" was entered on November 9th , 1998. The jurisdiction of this Court to review the order is invoked under 28 U.S.C. S. § 1254 and 28 U.S.C.S § 1257. The petition was filed within ninety days of November 9th, 1998, the date the United States Court of Appeals, for the Second Circuit, affirmed the district court's judgment.

STATUTORY PROVISIONS INVOLVED

1. Connecticut General Statute, Probate 45a-186, 45a-356, 45a-357, 45a-358.

2, The Constitution of the United States Amendment xiv

3. Americans with Disabilities Act 42 U.S.C. SS 12101 et. Seq. ("ADA")

STATEMENT OF THE CASE

The case was initially brought before the Probate Court in New Britain, Connecticut on March3rd, 1995, Judge, Walter A. Clebowicz presiding. The Plaintiffs Walter and Josephine Kirk having known the Decedent, Eugenia Kemmling, for almost twenty five years, instituted the action to try to recover some of the tremendous financial losses incurred in caring for Eugenia Kemmling, for the last ten years of her life. The defendant, Leopold Kemmling, is a nephew to the decedent, Eugenia Kemmling.

The claim against the estate was denied by Judge Walter A. Clebowicz, because it was not presented in a timely manner as required by statute.

The Connecticut State Statue's on probate, S-45-228, 45a-356, and 45a-357 which in a fundamental nature maintains an orderly and timely process, however in our particular case the statue's ramifications results in devastation and discrimination against the plaintiff, who had been stricken and found to be totally and permanently disable shortly after he delivered the eulogy at the funeral of Eugenia Kemmling on December 6th, 1992. Dr. Earle Biassey declared the plaintiff, Walter Kirk, totally and permanently disable during that timely fashion period, where with a claim may be presented to the Probate Court.

The results were that, the plaintiffs were not allowed to present their claim against the Estate of Eugenia Kemmling. (This claim is in excess of $37,000.00) also the plaintiffs were not allowed to contest the alleged will of Eugenia Kemmling.

The plaintiffs have brought their case before the Judicial System of the State of Connecticut, and also the United States District and Appeals Court during the period of March, 1995 thru November, 1998, have only to find that in all their rulings the Courts indicated that they lacked the Jurisdiction and Statutory Authority required to make a judgment in our particular case.

The Courts decision to dismiss, was based on the lack of statutory authority and jurisdiction to do otherwise.

There are no provision in the State Statues which allow for any consideration of the handicapped or totally disable, when dealing with the probate requirements of our particular case.

Present current State Statues, that apply to our particular case, are in violation of provisions of the Federal Constitution & Americans With Disabilities Act's and discriminate against the totally disable.

The United States Constitution, and specifically the l4th Amendment, provides all citizens, to include the disabled, with equal protection and due process of the law and shall not deprive any person his property.

All citizens have the same rights under the existing laws of the nation, states, and localities.

The U.S. District Court must have the Jurisdiction to review challenges to final state courts decision when they violate Federal Codes and Laws.

The plaintiff's plea to the Justice of the U.S. District Court, was that the court would properly refuse to enforce a statue it determines to be in violation of provisions of the Federal Constitution and Americans with Disability Act's that discriminate against the totally disable.

In the ruling on the MOTION TO DISMISS the UNITED STATES DISTRICT COURT cited cases in which the Rooker-Feldman Doctrine would deprive District Courts of subject matter jurisdiction.

The Court indicated that subject matter jurisdiction of cases in which a Federal Court may review a State court's decisions are very limited.

The Plaintiff-Appellant's plead that their particular case is one that falls with-in the "very limited area" and threshold line of jurisdiction and justifiability that question every federal case.

In one case cited by the District Court, Moccio versus New York State Office, Court admin. 95 F. 3rd 195 (2nd Cir. 1996) the court indicated, that the Rooker-Feldmen Doctrine did deprive the District Court from having jurisdiction to hear any challenge to the judicial determination of State Courts.

In reviewing, this cited case, the Plaintiff-Appellant has found that in the closing statement (17. Courts 509) the court stated that, if the Plaintiff-Appellant had shown violation of his right to equal protection and violation of due process, that would have voided operation of the Rooker-Feldman Doctrine and allowed the District Court subject matter jursidiction.

The Plaintiff-Appellant-Walter Kirk, has suffered violation of his right to equal protection and due process.

At that time period between December 1992 thru February 1995 the Plaintiff-Appellant was confined to his home, totally disable and unable to comprehend the law or even matter around him.

It was mid-way time, when the plaintiff was unable to comprehend the law, that the Kemmling Estate was presented to the Probate Court by the Defendant Leopold Kemmling, March 4th, 1993.

It was from this date, March 4th, 1993, that the Connecticut State Statutes on probate allows 150 days to present a claim against the Estate.

There are no provisions or exceptions what so-ever to allow any consideration of an extension of time for the disabled or handicapped. Only a consideration involving Military service of the United States or Allied Nations. On August 3rd 1993, the time had expired for presenting a claim.

When a disabled person can not comprehend, he is violated the concept of "Due process of the law" as it is embodied in the Fifth and Fourteenth Amendments. It demands that a law shall not be unreasonable or arbitrary, or capricious and that the means selected shall have a reasonable and substantial relation to the object being sought. U.S. v. Smith, D.C. Iowa, 249F. Supp. 515,516.

A fundamental requisite of "Due Process" is the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest, and to assert before the appropriate decision- making body the reasons for such choice. Trinity Episcopal Corp. v. Romney, D.C.N.Y., 387 F. Supp. 1044,1084.

The Constitution guarantee of "equal protection of the laws" that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in like circumstances in their lives.

In the final analysis of the District Court it indicated a "inextricably entwined" case with the State Court decisions that are being challenged.

Would the Justice's of the United States Court of Appeals consider, that the Plaintiff-Appellant did not initiate the proceedings in the State Probate Court, which was in the process on the Estate for over two years before the Plaintiff entered and is still open.

When the Plaintiff appealed the ruling of the Probate Court, the appeal was moved by the Probate Court, so that the action would not be abandoned by State Court procedure.

All the rulings handed down by the State Courts indicated that they were Statutory Courts and they had no jurisdiction or authority to make a judgment in our case.

The Appellants reply and argument in reference to "The claims are inextricably intertwined" with prior State Court judgments and the Federal Court lacks subject matter jurisdiction.

The plaintiffs being aggrieved by the decree of the Probate Court on December 21, 1995 made a motion to the Probate Court for an "Appeal from probate". This appeal was made in accordance with Connecticut Statute SS 45a-186.

This appeal from probate per statute and by law moves the appeal to the Superior Court.

The appellant has no option or choice of the route through the judicial process. Only the Probate Court and not Superior Court could allow appeal from Probate Court Decree. Emmons v. Hartford National Bank & Trust Co. (1970) 263A.2d 275, 28 Conn. Supp. 392.

Appeals from probate are not actions or civil actions between party and party. Savelewitz v. Solid (1959) 149 A. 2d 314, 21 Conn. Supp. 159.

In ruling on a probate appeal, the Superior Court is not exercising the power of a constitution court of general jurisdiction but is exercising the powers of a probate Court. Bishop v. Bordonaro (1989) 563A 2d 1049, 20 Conn. App 58

Superior Court on appeal from probate sits as and has no greater power than, the Court of Probate. Berkley v. Berkley (1965) 207 A. 2d 579, 152 Conn. 398.

Under Gen. St. 1918 SS 5071 (this section) giving right of appeal from Probate Court to Superior Court, the Appellate Court would try the case de novo, but it has no greater powers. Dunham v. Dunham (1922) 117 A. 504, 97 Conn. 440.

Through the entire State's Judicial Process, judicially and legislatively speaking the case never advanced beyond the Probate Court level. It is also a certainty that no constitutional issues were ever considered.

The defendant however indicates that, the state courts did consider all the issues including constitutional ones and thereby the case is "inextricably intertwined" and must be dismissed under the Rooker-Feldman Doctrine Moccio at 198.

The appellants using the same authority Moccio versus New York State, Office of Court Administration 95 F 3d 195 (2nd Cir. 1996) have found that the court stated that if the Plaintiff / Appellant had shown that he was denied his full and fair opportunity and his rights to equal protection and due process, it would have voided operation of the Rooker-Feldman Doctrine and would allow district courts subject matter jurisdiction.

The appellants have indicated in their brief that they indeed were denied a full and fair opportunity and rights to equal protection and due process's were violated.

In a related case, Justice Stevens stated, that State created rules governing licenses must comply with constitutional standards and must be administered in accordance with due process of law.

Given these acknowledged Constitutional limitations on

actions by the State, it should be beyond question that a Federal Court has subject matter jurisdiction over an individual's law suit raising federal constitutional challenges, Cont. District of Columbia Court of Appeals versus Feldman 460 U.S. 462 103 S CT. 1303 ; 75 L E d. 2d 206 (1983).

The Appellants reply and argument in reference to the Doctrine of Res Judicata, precludes the Plaintiffs from bringing the instant litigation to a Federal Court. Cain – v – Moore.

In the same authority as stated by the Defendant Appellee Cain v. Moore 182 Conn. 470 (1980) the court stated that there can be unusual circumstances in a case to justify an exception to the rule and that "only in most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has been raised and decided in the trial court.

In Wade's Dairy v. Town of Fairfield, Ct. 181 Conn. 556 (1980) the court states that the doctrine of res – judicata holds that an existing final judgment rendered upon the merits without fraud or collusion by a court of competent jurisdiction is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.

The appellants would argue that the Probate Court is not a court of competent jurisdiction that could consider the constitutional issues of their case and that the appellants did indeed have unusual and most exceptional circumstances to justify an exemption to the rule of res judicata.

In the ruling of the Superior Court Judge Salvatore F. Arena on the case of Kirk et al versus the Kemmling Estate et al, He stated that where the Probate Court lacks jurisdiction, so does the Superior Court on appeal. Gardner v. Balboin 218 Conn. 220, 225, 588 A. 2d 634 (1991)

WHY CERTIORARI SHOULD BE GRANTED

Review is warranted because all of the lower Federal and State Courts indicated that they lacked the jurisdiction and statutory authority required to rule on the matter.

There are special and important reasons therefore, of exceptional circumstances and compelling issues that involve the constitutional rights of totally disabled Americans.

The relief sought by the Petitioner is not available in any other Court except The Supreme Court of The United States of America.

Statutes or Laws that cannot pass a test of rational and reasonable basis, whether in the letter or spirit of the law where consideration of the physical or mental handicapped or disabled is not regarded, that statute is an ill conceived statute. Perhaps the intent was one thing, however the reality is another. The Supreme Court must set a clear Federal guide line concerning the scope of the question of Constitutional rights of the disabled regarding the timely manner of presenting a claim before the Probate Court.

That the Supreme Court would properly review and refuse to uphold a Probate Statute that gives no consideration of unusual circumstances for the disabled, when setting time limits for claims. That the Supreme Court would bring back again the shadow of the degrees of time that have gone by on the sundial of the Probate Court and allow the Petitioner one more opportunity to present their claim.

CONCLUSION

For the foregoing reasons, Petitioners submit the petition for a writ of certiorari should be granted.

Respectfully submitted,
Walter & Josephine Kirk, Pro-se's
February 2, 1999

APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FILED
NOV. 9, 1998
Carolyn Clark Cambell, Clerk

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the ninth day of November one thousand nine hundred and ninety-eight.

Present : HONORABLE RALPH K. WINTER,
Chief Judge,
HONORABLE THOMAS J. MESKILL,
HONORABLE GUIDO CALABRESI,
Circuit Judges

WALTER KIRK & JOSEPHINE KIRK,
Plaintiffs-Appellants,

- v - No. 97-9627

BERLIN PROBATE COURT, WALTER A. CLEBOWICZ LEOPOLD KEMMLING, EXECUTOR OF THE ESTATE OF EUGENIA KEMMLING,EUGENIE KEMMLING, EXECUTOR OF THE ESTATE OF EUGENIA KEMMLING.
Defendants-Appellees.

Appearing for Appellants: Walter Kirk, pro se, Milford, Conn.

Appearing for Appellees: Helen R. Kone, West Hartford, Conn.

Docket No. 97-9627
Page 2 of 2
District of Conn. No.3-97-CV-00340 (JCH)

Appeal from the United States District Court for the District of Connecticut (Hall, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Walter Kirk and Josephine Kirk ("Kirks") appeal from Judge Hall's order dismissing their complaint for lack of subject matter jurisdiction. The district court found that appellants' claim was barred by the Rooker-Feldman doctrine which holds that lower federal courts are without jurisdiction to reverse or modify state court judgments. See District of Columbia Court of Appeals v. Feldman, 460 U. S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

The district court's decision is subject to de novo review, Moccio v. New York State Office of Court Admin., 95 F.3d 195, 198 (2d Cir. 1996). Because all of the Kirk's claims were either raised in the Connecticut proceedings or were "inextricably intertwined" with the state court's determinations, Feldman, 460 U.S. at 482 n.16, we affirm.

FOR THE COURT:
CAROLYN CLARK CAMPBELL, Clerk
By: Lucille Carr 11/09/98

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT, BRIDGEPORT

FILED
NOV. 24, 1997
DEC. 5, 1997
Carol E. Cannad, Deputy in Charge

WALTER KIRK, ET AL, PLAINTIFF

Vs.

PROBATE COURT, DISTRICT OF BERLIN, ET AL,
DEFENDANT

No. 3-97-CV-00340 (J.C.H.)

JUDGMENT

(et seq.)

Therefore, under the Rooker-Feldman Doctrine, this Court is without jurisdiction over the Plaintiff's Claims. Rooker, 263 U.S. at 415-16 Feldman, 460 U.S. at 476-79. "The Motion to Dismiss" by the Defendant's is GRANTED.,.

Honorable Janet C. Hall
United States District Judge

SUPREME COURT STATE OF CONNECTICUT

FILED
FEB. 4, 1997
Alan M. Gannuscio, Assistant Clerk

WALTER KIRK ET AL., PLAINTIFF

Vs.

LEOPOLD KEMMLING, EXECUTOR OF THE ESTATE OF EUGINIA KEMMLING, DEFENDANT.

No. PSC-96-0268

'ORDER ON PETITION FOR CERTIFICATION TO APPEAL"

On consideration of the petition, by the Plaintiff's, for Certification to Appeal from the Appellate Court (44 Conn. App. 904—AC 16025) it is hereby ordered that said petition be, and the same is hereby DENIED.

By The Court
Alan M. Gannuscio
Assistant Clerk-Appellate

APPELLATE COURT OF THE STATE OF CONNECTICUT
HARTFORD, CONNECTICUT

FILED
JAN. 7, 1997
No. A.C. 16025

Appeal from the Superior Court in the Judicial District of Hartford-New Britain, Arena, J.

Per. Curiam. The Judgment is AFFIRMED

O'Connell, Spear, and Hennessy, Judges.

Connecticut Law Journal
January 7th, 1997

STATE OF CONNECTICUT
SUPERIOR COURT
HARTFORD/NEW BRITAIN

FILED
MAY 8, 1996

WALTER KIRK ET AL.

Vs.

LEOPOLD KEMMLING, EXECUTOR OF THE ESTATE OF EUGENIA KEMMLING

No. CV-96-0472093 S

JUDGMENT

The Appeal from Probate, DENYING the Petition of Walter & Josephine Kirk to Re-open and extend the claim period and thence GRANTING a Motion To Dismiss by the Defendant.

By The Court
Hon. Salvatore F. Arena, Judge

STATE OF CONNECTICUT, DISTRICT # 007
COURT OF PROBATE, DISTRICT OF BERLIN

FILED
DEC.1, 1995
Veronica B. Cardoso, Ass't. Clerk

ESTATE OF EUGENIA KEMMLING

Petition of Walter & Josephine Kirk to Re-open and extend the claim period as said in the application on file more fully appears.

ORDERED AND DECREED;
'Petition is DENIED.'

Walter A. Clebowicz, Judge
December 1, 1995

STATE OF CONNECTICUT, DISTRICT #007
COURT OF PROBATE, DISTRICT OF BERLIN

FILED
Sept. 26, 1995
Judith M. Lindgren, Ass. Clerk

ESTATE OF EUGENIA KEMMLING

Application for approval of a claim on the Estate of the Decedent Eugenia Kemmling by the Petitioner's Walter & Josephine Kirk

'ORDERED AND DECREED'

'Dismissed for not being filed in a timely manner as required by Statute.

Walter A. Clebowicz, Judge
September 26, 1995